(2)

No. 05-1399

Supreme Court, U.S.
FILED
JUL 21 2006
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IN THE

Supreme Court of the United States

HUGH HARDAGE,

Petitioner,

v.

CBS BROADCASTING, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), an employer sued by an employee for sexual harassment by a co-worker, provided no tangible employment actions were taken against the employee, may defeat the claim by showing "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. This case presents the following question:

Whether the Court of Appeals properly concluded that by Petitioner's deposition testimony and the other record evidence CBS established both elements of the *Faragher/ Ellerth* defense, *i.e.*, that CBS exercised reasonable care to prevent and correct any harassment and that Petitioner unreasonably failed to take advantage of the preventive and corrective opportunities provided by CBS by misleading the company about the real nature of his concerns and by insisting that CBS take no action.

RULE 29.6 STATEMENT

Respondent CBS Broadcasting Inc. is a New York corporation that is indirectly wholly owned by CBS Corporation. Prior to January 1, 2006, CBS Corporation had been named Viacom Inc. Respondent Viacom Television Stations Inc. became known as CBS/UPN Television Stations Inc. on February 27, 2006, and is a Delaware corporation that is indirectly wholly owned by CBS Corporation. Respondent Viacom Broadcasting of Seattle Inc. is indirectly wholly owned by CBS Corporation. As of January, 3, 2003, Viacom Broadcasting of Seattle Inc. became known as UPN Television Stations Inc.

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I

This case involves a simple application of the *Faragher/ Ellerth* defense to an unusual set of facts: a management-level employee reported that he was uncomfortable with his general manager, a woman he said had developed a romantic interest in him. He admits that he misled his employer about the nature of his concerns and that he told the company no official action was necessary. He now complains his employer did not adequately investigate and remedy harassment he never reported. The petition for certiorari should be denied because (1) no conflict among the circuit courts exists regarding the application of the *Faragher/Ellerth* defense in like circumstances, (2) the Court of Appeals properly stated and correctly applied the defense to the facts of this case, and (3) the question the petition presents is not raised by this case and was decided six years ago in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

STATEMENT

I. Factual Background

Petitioner Hugh Hardage is a former local sales manager at KSTW, a Seattle-area television station owned and operated by Respondents (collectively "CBS"). He alleges he was sexually harassed by the station's general manager, Kathy Sparks. Both CBS and Sparks deny any harassment occurred.

As a management-level employee, Hardage was trained regarding CBS's harassment policies. He was responsible for training the sales executives he supervised on those policies and obligated to report any harassment to the company's human resources department. App. 59-60.

Hardage testified that he is a flirtatious person who often engaged in playful banter with co-workers, including Sparks. App. 3, 41. While at KSTW, he was admittedly open about his sexuality, and his love life in general was, in his words, "[d]efinitely" part of the water cooler talk and "a big topic of conversation around the office." App. 3. Hardage's exploits included dating and sexual relationships with co-workers and subordinates, as well as drinking and drug use with his subordinates. *See* Plaintiff's Motion in Limine to Exclude Entrance of Past Sexual Behavior and Prior Drug Use, District Court docket entry #15. He engaged in and arranged after-hours social activities with Sparks and even referred to her by pet names, including "Sparkalicious," "Baskin Robbins 32nd Flavor," and "Ms. Sparky." App. 3, 42.

Hardage enjoyed his work and admired his superiors, at one point describing himself as "[h]appier than hell" to be at KSTW, and describing Sparks and his direct supervisor, Patty Dean, as having "a wealth of knowledge, enthusiasm, class, etc." Excerpts of Record filed with the Court of Appeals ("ER") 971. He also turned down two job opportunities elsewhere in October and November 2000. ER 839-40, 87577. Prior to October 2000, Hardage never complained to anyone about being uncomfortable with Kathy Sparks or with anything or anyone else at KSTW. App. 16-17.

In October 2000, after Hardage and Sparks attended a Seattle Mariners game with some KSTW clients, Hardage invited her to join him and some friends at a local bar for drinks. At the bar, Sparks allegedly asked Hardage, "Who haven't you fd in here?" and reacted angrily when Hardage responded, "I haven't fd anybody in here . . . but hopefully she's next," and pointed to the woman next to him. App. 5, 46-47.

The following day, Hardage told his supervisor, Patty Dean, that Sparks had lost her temper in the bar the night before. App. 5. Dean had not observed or heard of any acts of harassment by Sparks, and Hardage testified that he did not tell her about any such acts during their conversation about Sparks' yelling at the bar. App. 5-6, 16-17.

Because the situation involved Sparks, her direct supervisor, Dean immediately called Ray Rajewski, an executive vice president at CBS, for assistance. App. 6. Rajewski then called Hardage to let him know that Paul Falcone, a representative from human resources, would contact him. App. 6. Hardage did not tell Rajewski anything about his concerns and did not report to him any alleged harassment. App. 6. Falcone called Hardage that same day and arranged to meet with Hardage in Seattle the following week. App. 6.

When Falcone and Hardage met, Hardage did not mention any harassment. Rather, he merely informed Falcone that he felt that Sparks had developed feelings for him and that he was not sure how to handle the situation. App. 47; ER 686. Falcone specifically asked Hardage whether Sparks had engaged in inappropriate behavior or unwanted touching, and Hardage said no. App. 47-48; ER 686-91. Hardage admitted in deposition that he did not notify Falcone of harassment but simply informed Falcone that Sparks had made advances off-hours, which overtures he had rejected. App. 6, 47-48; ER 827-28, 891-92. Falcone explained several options available to Hardage, including registering a complaint, but, as Hardage testified in deposition, he insisted on handling his relationship with Sparks himself. App. 6. Hardage also specifically insisted that he did not want to trigger any formal processes, saying he "really [didn't] want

to escalate it to that level." App. 48; ER 690-91. Falcone called Hardage two weeks later to follow up, and Hardage told him nothing new had happened and that he did not want Falcone to intervene. App. 6-7.

Hardage resigned ten months later because he repeatedly failed to meet sales goals and, according to his own resignation letter, adverse market conditions had created pressure that had "deflated" him. App. 7.

Hardage now complains of several alleged sexual advances by Sparks between April 2000 and his conversation with Falcone in October 2000. He also complains that CBS should have done more to address the alleged harassment, despite the undisputed facts that at no point during his employment with KSTW did he report any of the alleged conduct by Sparks (all of which is alleged to have occurred off-hours, away from the office), that he explicitly denied any harassment when asked, and that he told the company no action was required because he wanted to handle his relationship with Sparks himself.

II. Procedural History

Hardage filed suit, alleging sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Washington Law Against Discrimination. Wash. Rev. Code § 49.60.180. The parties filed cross-motions for summary judgment. Hardage also filed a motion in limine seeking to exclude evidence of his drug use and romantic relationships with subordinates and co-workers and his lewd workplace sexual banter. ER 1051. The District Court granted summary judgment for CBS, holding that CBS had established the *Faragher/Ellerth*

defense and that Hardage had suffered no tangible employment action for purposes of his retaliation claim. App. 52-67. Because the court granted summary judgment for CBS, it denied Hardage's summary judgment motions as moot, and it never ruled on his motion in limine. App. 67; ER 1051-57.

Hardage appealed to the Ninth Circuit, which affirmed the District Court. Following *Faragher* and *Ellerth*, the court held that CBS maintained a vigorous anti-harassment policy, which manifested reasonable care to prevent sexually harassing behavior, and that it exercised reasonable care in responding to Hardage's vague reports that Sparks had lost her temper in a bar and that he thought Sparks had developed feelings for him. App. 13-17. It also held that Hardage failed to take advantage of the opportunities provided him to ameliorate his situation and address any harassment he experienced. App. 18. Specifically, based on Hardage's admissions in deposition, the court held that Hardage failed to put CBS on notice of the conduct alleged in his complaint and cut off the investigation CBS started by denying any harassment by Sparks and insisting on handling the situation himself. App. 15-18. The court also held that, contrary to Hardage's argument that CBS knew of the alleged harassment, the only reasonable inference from the extensive record, including Hardage's own behavior at work, was that CBS was not on notice of any alleged harassment, either from other observations by CBS employees or from other conversations between Hardage and his coworkers. App. 15-17. The court denied Hardage's petitions for rehearing and rehearing *en banc*, with no judge calling for a vote on the petition. App. 70-74.

REASONS FOR DENYING THE PETITION

Hardage argues that the Court of Appeals' decision conflicts with this Court's prior decisions and with case law among the circuits. He also argues that the *Faragher/Ellerth* defense requires that employers conduct formal sexual harassment investigations (including interviews with witnesses and confronting the employees involved) in all cases where employees come forward with sexual harassment complaints, and that the Ninth Circuit erred by not adopting such a rule. He is wrong on each count. The Court of Appeals properly applied the *Faragher/Ellerth* defense, and its decision is consistent with the decisions of other circuits. The rigid rule Hardage urges is not only inapplicable to the facts of this case, but is contrary to *Faragher* and *Ellerth*, which set a "reasonableness" standard both for employers and employees and which requires a context-sensitive analysis driven by the particular facts of a case.

I. The Ninth Circuit Decision Is In Accord With Every Circuit That Has Addressed Similar Applications Of The *Faragher/Ellerth* Defense.

Hardage's argument that the Ninth Circuit decision creates a circuit split misreads the case law. There is no such split. The cases Hardage cites, in addition to numerous cases he fails to cite, illustrate that the decision here is in full accord with the developing case law across the country regarding the *Faragher/Ellerth* defense.

A. The Decision Below Does Not Conflict With The Cases Cited In The Petition.

Hardage cites four cases, none of which conflicts with the decision here.

1. In *Clark v. United Parcel Service, Inc.*, 400 F.3d 341 (6th Cir. 2005), a number of supervisors witnessed repeated harassment of the plaintiff and, despite having a duty to do so according to internal policy, did not report the harassment. *Id.* at 350. The victim never raised a formal complaint (she complained informally by asking her supervisor, immediately after harassment the supervisor witnessed, "How does he get away with this[?]"), but the employer was unquestionably aware of the harassment. *Id.* Reversing summary judgment for the employer, the Sixth Circuit held that the employer had a duty to take corrective actions because it, unlike CBS here, had repeatedly observed the on-site harassment. The employer's failure to exercise reasonable care in *Clark* was not rooted in the company's failure to investigate, as Hardage claims, but in the failure of the supervisors who witnessed the harassment to fulfill their duty to report it. *Id.* at 350-51.

2. In *Smith v. First Union National Bank*, 202 F.3d 234 (4th Cir. 2000), a female employee was repeatedly harassed by a male co-worker and expressly communicated the nature and scope of the harassment to her employer, but the employer never addressed her complaints. *Id.* at 245. Additionally, a supervisor had actively discouraged the complaining employee from utilizing the employer's sexual harassment reporting mechanisms, telling the employee that if she "ever wanted to get anywhere, [I'd] never contradict anyone in an open meeting, and [I'd] never complain to human resources." *Id.* The Fourth Circuit reversed summary

judgment for the employer because, notwithstanding the employee's formal requests for intervention, the employer refused to separate the employee from the harasser and conducted an unreasonable investigation which completely ignored the sexual harassment complaints and focused instead on the harasser's "management style." *Id.* at 240, 245-46.

3. In *Arrieta-Colon v. Wal-Mart Puerto Rico, Inc.*, 434 F.3d 75 (1st Cir. 2006), an employee with a penile implant, which gave him the appearance of having a permanent semi-erection, was harassed frequently and openly by co-workers. *Id.* at 80. He complained numerous times, but the employer did nothing to address or correct the problem. *Id.* at 80-82. On appeal from a jury verdict for the employee, the First Circuit affirmed. Rejecting an argument that a jury instruction on the *Faragher/ Ellerth* defense was improperly denied, the court noted, "the supervisors, including Wal-Mart's own personnel department, were well aware of the co-worker harassment and chose to let it occur. . . ." *Id.* at 87. As in *Clark* and *Smith*, the employer in *Arrieta-Colon* knew about frequent harassment and failed to take corrective action. Moreover, like *Smith*, the court in *Arrieta-Colon* said nothing about a purported duty to investigate, but rather addressed the employer's duty to correct harassment about which it was already aware.

These three cases cited by Hardage are not inconsistent with the Court of Appeals decision here. The only way Hardage can argue that these cases conflict with the decision below is to try to change the facts on which the decision below was based. In each of the above cases Hardage cites, and unlike in this case, the employer was on clear notice of repeated sexual harassment, either through witnessing it or through explicit complaints from the victim employee but did nothing to address the harassment. Here, CBS was never made aware of the alleged conduct. App.

15-17. Moreover, Hardage not only misled CBS about the nature of his concerns but also instructed CBS not to take any action in response to his concerns about Sparks' alleged feelings for him. App. 6-7, 47-48. None of the employees in *Smith*, *Clark*, or *Arrieta-Colon* similarly misled the employer or thwarted the employer's efforts to respond.

4. Finally, *Malik v. Carrier Corp.*, 202 F.3d 97 (2d Cir. 2000), is neither a Title VII case nor a sexual harassment case, and it did not apply the *Faragher/Ellerth* defense: it involved a claim of wrongful discharge brought by a perpetrator of harassment. *Id.* at 99. In addition, as the Ninth Circuit majority in this case noted, the language Hardage relies upon is dicta, App. 15 n.1, which merely refers in the abstract to "[p]rudent" and "risk-averse" employers acting to avoid liability that "may" be imposed if they fail to "take reasonable corrective action." *Id.* at 105-06; *see also* App. 15 n.1. It does not stand for the proposition that an investigation—much less the particular type of investigation preferred by Hardage—is always required when an employee, however obliquely, alleges sexual harassment (or, as here, merely reports concerns about his relationship with his manager). Pet. 18-21.

Hardage's reliance on EEOC guidance, Equal Employment Opportunity Commission, Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, No. 915.002 (6/18/99) ("EEOC Guidance"), to support his argument for mandatory investigations is similarly misplaced. *See* Pet. 15-17. First, Hardage did not call the EEOC Guidance to the courts' attention below. Second, the Guidance does not support Hardage's call for mandatory investigations in all circumstances. The Guidance contemplates that investigations may be warranted, depending on the circumstances, but it also states that before an investigation is launched, management "*should*

determine whether a detailed fact-finding investigation is necessary." EEOC Guidance, II.V.C.1.e. (emphasis added). Moreover, like the decision below, the EEOC recognizes that while, depending on the circumstances, liability is *possible* when an employer honors an employee's wish for inaction or confidentiality, it is not automatic. EEOC Guidance, II.V.C.1.d.; App. 73.

B. The Decision Below Is Consistent With Numerous Cases From Other Circuits.

Cases ignored by Hardage, including cases from the Second, Fourth, Seventh, and Eleventh Circuits, further illustrate that the Ninth Circuit's decision comports with evolving *Faragher/ Ellerth* case law. The Second Circuit has addressed situations similar to the facts here at least three times. In *Ferraro v. Kellwood Co.*, 440 F.3d 96 (2d Cir. 2006), an employee submitted a disability leave request form citing "harassment at work" as a reason for the request, and the employer followed up with the employee, asking her to complete an attached form so that it could investigate the harassment. *Id.* at 99. The employee never filled out the form, and the employer therefore undertook no investigation and disciplined no one. *Id.* Even though, unlike here, the employer had actual notice from the employee that she was complaining of "harassment," the Second Circuit held that the employer's follow-up measures, combined with the employee's failure to take advantage of the corrective opportunities available, were sufficient to establish the *Faragher/Ellerth* defense and affirmed summary judgment for the employer. *Id.* at 103.

In *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283 (2d Cir. 1999), *cert. denied sub nom. Metro-North Commuter Railroad Co. v. Norris*, 529 U.S. 1107 (2000), an

employee, at a disciplinary meeting concerning her absenteeism, became emotional and explicitly complained of being sexually harassed. *Id.* at 290. She was referred to the Affirmative Action Director, but she did not tell him the specifics of the harassment. *Id.* She said she was treated poorly but never mentioned sexual harassment and asked the employer not to investigate. *Id.* The employer complied with her wishes, and the Second Circuit held that the employer established the *Faragher/Ellerth* defense and affirmed summary judgment for the employer. *Id.* at 290, 295-96.

Finally, prior to this Court's decisions in *Faragher* and *Ellerth*, the Second Circuit decided *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997). In circumstances similar to those here, an employee approached a supervisor about harassment from a coworker but asked him to take no action and not to speak to others about it. *Id.* at 638-39. The supervisor asked, "what to you want to do about it[?]" and the employee said, "[N]othing." *Id.* at 638. The supervisor then offered his assistance going forward, which offer the employee ignored. *Id.* The Second Circuit affirmed a grant of summary judgment for the employer. In an opinion by Judge Calabresi, the court stated:

> [T]he law will not presume in every case that harassed members of Title VII's protected classes do not know what is best for themselves and cannot make reasonable decisions to delay—at least for a time—pursuing harassment claims, perhaps for privacy or emotional reasons, until they are ready to do so.

Id. at 639. The court also noted, as did the Ninth Circuit here, that the employee unreasonably failed to disclose the breadth and depth of the harassment. *Id.*; *see also* App. 73.

Likewise, in *Brown v. Perry*, 184 F.3d 388 (4th Cir. 1999), an employee contacted her supervisor after another supervisor made unwanted sexual advances towards the employee. *Id.* at 390. She explained the incident to another supervisor, who told her, "Whatever you want to do, I'll support you 100%." *Id.* Her employer's offer of assistance notwithstanding, she declined to ask her employer to take any action. *Id.* at 390-91. The Fourth Circuit affirmed summary judgment for the employer, holding that the *Faragher/Ellerth* defense was established: the employer, "confronted with a victim who was continuing to work effectively and did not wish to pursue the matter," acted with reasonable care, while the employee's declining the offer of assistance was unreasonable. *Id.* at 396-97.[1]

In *Durkin v. City of Chicago*, 341 F.3d 606 (7th Cir. 2003), a policewoman-in-training had repeatedly complained to the employer about a hostile environment in her gun skills training, and about a harassing supervisor in particular. *Id.* at 609-10. Like Hardage's conversations with Dean, Rajewski, and Falcone, her complaints were "vague" and never addressed acts of sexual harassment in particular. *Id.* at 609-10, 612-13. The Seventh Circuit declined to require the employer to unearth the harassment she failed to articulate when given the opportunity. *Id.* at 612-13.

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1. The recent decision in *Howard v. Winter*, 446 F.3d 559 (4th Cir. 2006), wherein summary judgment for the employer was reversed, is distinguishable from both this case and *Brown*. The plaintiff in *Howard* went to her employer, deeply upset, and using strong language accused a co-worker specifically of inappropriate sexual touching. Unlike CBS, the employer in *Howard* asked no follow-up questions and offered no assistance but simply told her to keep track of the harasser's behavior and notify human resources if something happened again later. *Id.* at 569-70.

Finally, in *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir. 2000), *cert. denied*, 531 U.S. 926 (2000), two employees informally complained to supervisors about harassment (actually witnessed by some of the supervisors), but did not indicate that they wished for the employer to act to address their complaints, and failed to disclose the severity of the conduct or to utilize the employer's formal complaint procedures. *Id.* at 1293. The Eleventh Circuit affirmed summary judgment for the employer, holding that the employer acted with reasonable care when it did nothing to address the harassment, since the employees did not affirmatively request assistance, and therefore the employer "could not reasonably have been expected to act to address the plaintiffs' complaints." *Id.* at 1293, 1300, 1302. The court also held that the employees acted unreasonably in failing to "fully inform" the employer of the harassment and failing to request assistance. *Id.* at 1302.

In each of these cases, the employees approached their employers with initial allegations of harassment but either failed to request assistance or rebuffed their employers' efforts to address the allegations. Like the decision below, these cases held that the employers' decisions not to insist on pursing the matters further were reasonable and that the employees' failures to take advantage of employer-provided mechanisms were unreasonable for purposes of the *Faragher/ Ellerth* defense and affirmed summary judgment. Here, CBS was not even on notice of any acts of harassment, and when the company began an investigation of Hardage's report to Dean about Sparks' losing her temper, he cut it short by misleading the company about the nature of his concerns and by telling Falcone that he did not want the company to get involved. Like the employers in *Ferraro; Caridad*, *Torres*, *Brown*, *Durkin*, and *Madray*, CBS acted with reasonable care,

both in addressing the facts presented to it and in honoring Hardage's request to let him handle his relationship with Sparks on his own. And like the employees in these cases, Hardage unreasonably withheld information from CBS and insisted it take no action to assist him.

Contrary to Hardage's contentions, the Ninth Circuit's decision is squarely in accord with every circuit court to have addressed similar facts. The First, Second, Fourth, Sixth, Seventh, and Eleventh Circuits all agree that where an employer limits its response because the employee has withheld information regarding the nature or scope of the alleged conduct, or reasonably acquiesces to an employee's request not to pursue matters raised by that employee, that employer may act with reasonable care for purposes of asserting the *Faragher/Ellerth* defense, while an employee who fails to report harassment, or rejects assistance offered by the employee, may act unreasonably for purposes of the defense.

II. The Court of Appeals Applied The Correct Standard And Reached The Correct Result Based On The Record.

Hardage concedes, as he must, that the Ninth Circuit decision applied the correct legal analysis (the two-pronged reasonableness inquiry of *Faragher* and *Ellerth*) to his claims and CBS's defenses. Pet. 8, 12; App. 9, 13, 18. Hardage nonetheless attempts to critique the Ninth Circuit's decision by misrepresenting its holding, its rationale, and the facts on which the decision in based. Rather than address the decision directly, Hardage complains that, based on his preferred version of the facts, the court below reached the wrong result. His objection to the decision, properly understood, is simply that the court drew factual inferences from the record with

which he disagrees—that the court got the law right but the record wrong. *See* Pet. 6 n.1, 10, 13, 17 (arguing that the court below misapplied the summary judgment standard). Such an argument does not warrant this Court's review. *See* S. Ct. R. 10.

Hardage's petition presents a different case from the one decided below. In the first instance, Hardage argues that he raised a "formal complaint" of sexual harassment, and most of his arguments turn on that assumption. Pet. 13, 18. To the contrary, Hardage emphasized to CBS that he did not want to engage any formal processes, and simply sought consultation regarding his discomfort with Sparks' apparent feelings for him. App. 6, 48, 60, 63; ER 827-28, 890-92. And when Falcone asked Hardage specifically if Sparks had engaged in any inappropriate sexual behavior, Hardage said no. App. 47-48; ER 686-91.

Hardage argues that the Ninth Circuit's decision will allow employers to "do nothing" when faced with allegations of sexual harassment. Pet. 12, 15. This argument misrepresents the facts in the record and the Court of Appeals' decision. CBS's response, as the court held, was *not* to do nothing. Though unaware of any harassment, Dean, Rajewski, and Falcone took a number of steps to address the concerns Hardage articulated, following up with him twice after he first approached Dean about Sparks' lost temper. App. 5-7, 60. These efforts were cut short by Hardage, who protested that he did not want to register a formal complaint and insisted on handling Sparks' alleged romantic feelings for him on his own. App. 6-7, 48, 60, 63; ER 686-91, 827-28, 890-91.

Hardage likewise misreads the holding when he argues that the Ninth Circuit held that, for purposes of the second prong of the *Faragher/Ellerth* defense, it was unreasonable for Hardage to "accept an employer provided option to handle the harassment on his/her own. . . ." Pet. 12, 15. That Hardage supposedly accepted a suggestion that he handle the matter on his own did not animate the court's decision. Rather, the court held that Hardage acted unreasonably both by failing to place CBS on notice of the nature and severity of Sparks' alleged behavior in the first instance and by cutting off CBS's attempts to address the concerns as he reported them. App. 16-17.[2]

Contrary to Hardage's arguments, the Ninth Circuit properly applied the *Faragher/Ellerth* analysis and rightly held, based on the record before it, (1) that CBS was unaware

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2. Numerous other descriptions of the case are misleading. The petition consistently presents Hardage's preferred version of the facts, rather than either facts in the record or the version of facts held supportable by both courts below for purposes of summary judgment. Sparks made no "sexual advances in the office." *Compare* Pet. 2 *with* App. 3, 42, 61. Nor did Patty Dean believe that Hardage "was complaining about sexual harassment." *Compare* Pet. 4, 20 *with* App. 5-6, ER 792-93. Likewise, both the District Court and the Court of Appeals rejected Hardage's contention that he "had previously complained to Dean about Sparks' harassing conduct on several occasions," Pet. 4, as being unsupported by the record. App. 16, 61-62. It is also not true that "Falcone did not ask Hardage about the details of the sexual harassment." Pet. 5, 20 (describing Hardage's failure to provide information that was, in Hardage's view, "not asked of him"). Falcone specifically asked Hardage whether any inappropriate conduct had taken place, but Hardage denied that it had. App. 47-48; ER 686-91. And Hardage did not resign "because of" any alleged harassment. His own resignation letter establishes that he resigned because of market pressures that he admittedly could not handle. App. 7.

of alleged sexually harassing behavior (because Hardage, a management-level employee, unreasonably withheld information about that behavior); (2) that when CBS attempted to address Hardage's concern that Sparks had a romantic interest in him, Hardage misled CBS about the nature of his concerns and requested that no company action be taken; and (3) that under these circumstances CBS exercised reasonable care as required under the *Faragher/Ellerth* framework; and (4) that Hardage unreasonably failed to take advantage of the preventative and corrective opportunities available to him. Moreover, the decision below is both informed and limited in reach by the remarkable nature of the record, which includes undisputed evidence of Hardage's rambunctious behavior and interactions with subordinates, peers, and his alleged harasser; his status as a management-level employee; his admission that he never told anyone about Sparks' alleged sexual conduct; his admission that he withheld information about the real nature of his concerns even when speaking to Falcone; and his admission that he specifically requested that the company take no further action.

III. The Question Hardage Wants The Court To Address Is Not Raised By This Case, And His Proposed Answer Is Inconsistent With *Faragher* and *Ellerth*.

Hardage asks the Court to review the decision below and to take the opportunity to establish a rigid rule requiring employers to launch a formal, exhaustive fact-finding investigation whenever an employee complains about sexual harassment. In addition to the reasons set out above, the Court should deny the petition because such a rigid rule would be inconsistent with the Court's decisions in *Faragher* and *Ellerth* and because the issue is not raised by the facts of this case.

In articulating the *Faragher/Ellerth* defense, the Court eschewed imposing rigid standards of conduct, either on employers or employees. Instead, the Court incorporated principles of reasonable care from tort law, entrusting the lower courts to apply those principles on a case-by-case basis, considering the myriad interpersonal and contextual forces at play when sexual harassment is either alleged or occurs at the workplace. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. (And as demonstrated above, the courts have been doing so consistently and without difficulty.) Hardage's proposed rule would contradict these principles.

Moreover, this case does not even raise the question Hardage wants the Court to address. As explained in detail above, Hardage never reported the conduct he now complains of. Moreover, when Hardage reported to Dean that Sparks lost her temper in the bar (his only complaint to CBS about Sparks), CBS immediately began an investigation, during which Hardage specifically denied any sexual harassment.

CONCLUSION

For the reasons stated, the Court should deny the petition.

Respectfully submitted,

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